No. 06-5247

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In The

Supreme Court of the United States

JOHN F. FRY,

Petitioner,

v.

CHERYL K. PLILER, Warden,

Respondent.

On A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

If constitutional error in a state trial is not recognized by the judiciary until the case ends up in federal court under 28 U.S.C. § 2254, is the prejudicial impact of the error assessed under the standard set forth in *Chapman v. California*, 386 U.S. 18 (1967), or that enunciated in *Brecht v. Abrahamson*, 507 U.S. 619 (1993)? Does it matter which harmless-error standard is employed? And, if the *Brecht* standard applies, does the petitioner or the State bear the burden of persuasion on the question of prejudice?

LIST OF PARTIES

Petitioner, John Francis Fry, is represented by Victor S. Haltom, Esq., of Sacramento, California.

Respondent, Cheryl K. Pliler, a warden in the California Department of Corrections, is represented by Deputy Attorney General Ross C. Moody, of San Francisco, California.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is unreported, J.A. 211-214, but is available at *Fry v. Pliler*, 2006 U.S. App. LEXIS 2694, 2006 WL 249542 (CA9 2006). The order of the court of appeals denying Mr. Fry's petition for rehearing and suggestion for rehearing en banc is unreported. J.A. 215.

The memorandum of findings and recommendations prepared by the magistrate judge, J.A. 114-207, which was adopted in full by the district court, is unreported. J.A. 208-210.

JURISDICTION

The opinion of the court of appeals was issued on February 2, 2006. J.A. 211. The order of the court of appeals denying Mr. Fry's petition for rehearing was entered on April 25, 2006. J.A. 215. The judgment of the court of appeals was filed on May 5, 2006. Pet. App. 7a. The petition for a writ of certiorari was filed on June 20, 2006, and was granted on December 7, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, § 2, cl. 3 of the Constitution provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . ."

Article VI of the Constitution provides, in pertinent part, that the "Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby. . . ."

The Compulsory Process Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . . ."

The Sixth Amendment also provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

The text of 28 U.S.C. § 2254 is set forth in an appendix to this brief.

STATEMENT

John Fry was tried three times in the California state courts for the murder of two individuals. J.A. 114, 121, 211. The first two trials ended when evenly divided juries could not reach verdicts. J.A. 121. While the third trial was underway, Mr. Fry's trial attorney discovered a witness, Pamela Maples, who had heard her cousin, Anthony Hurtz, admit that he was the perpetrator. J.A. 6-24. However, the trial court refused to allow Ms. Maples to testify before the jury. J.A. 14-17. Notwithstanding the

exclusion of Ms. Maples' testimony, the third jury labored through five weeks of deliberations, and at one point declared itself deadlocked 7-5, before returning a guilty verdict. J.A. 114, 121.

The state appellate courts, in which Mr. Fry challenged the constitutionality of the trial judge's exclusion of Ms. Maples' testimony, concluded the trial court's ruling was proper. J.A. 94-97, 113. Every federal judge who has considered the issue on habeas review, however, has concluded that Ms. Maples' proffered testimony was reliable and that its exclusion was constitutional error. J.A. 178-180, 208-209, 212-214. Yet, the constitutional violation has been deemed non-prejudicial based upon determinations that a) the applicable harmless-error standard is the standard established by this Court in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), J.A. 180-182, 208-209, 212-213; and b), using the *Brecht* standard, the exclusion of Ms. Maples' testimony implicating her cousin did not have a substantial and injurious effect on the jury's verdict. J.A. 180-182, 208-209, 212.

Because neither the state nor federal courts assessed the prejudicial impact of the unconstitutional exclusion of Ms. Maples' testimony under *Chapman v. California*, 386 U.S. 18 (1967), this case presents the question whether *Brecht* is the appropriate standard here. This question is especially germane given that the constitutional violation in this case "directly affect[ed] the ascertainment of guilt. . . . " *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

Additionally, because the burden to demonstrate prejudice was erroneously placed upon Mr. Fry in § 2254[1] proceedings below, J.A. 180-182, 208-209, this case involves consideration of the proper allocation of the burden of persuasion or "the risk of non-persuasion." *O'Neal v. McAninch*, 513 U.S. 432, 447 (1995) (Thomas, J., dissenting). Finally, given that it took three trials for the State to convict Mr. Fry, J.A. 67, 114, 211, 214, with extraordinarily lengthy and contentious deliberations in the third trial, J.A. 121, 195-197, 214, this case presents the question whether the unconstitutional exclusion of Ms. Maples' reliable and unbiased testimony directly implicating her cousin can be deemed non-prejudicial under any principled standard of review.

A. Procedural Background

Mr. Fry was tried by jury three times in the Superior Court of Solano County, California, on two counts of murder. *See* California Penal Code § 187. After the jury in the third trial returned a guilty verdict, J.A. 114, 121, the trial court sentenced Mr. Fry to life imprisonment without the possibility of parole. J.A. 25, 114.

B. The Underlying Facts

Shortly after 6:00 a.m., on October 27, 1992, the bodies of James and Cynthia Bell were found in a vehicle parked on a dirt shoulder next to a highway in northern California. They had both been shot to death. J.A. 26, 122-123.

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[1] 28 U.S.C. § 2254.

As discussed below, evidence adduced at trial by the prosecution linked Mr. Fry to the double homicide. The defense presented evidence that another person was the perpetrator, but the prosecution countered with testimony that the third-party-guilt evidence was unreliable. Although Mr. Fry proffered reliable, unbiased testimony that someone other than him was indeed the perpetrator, the trial court excluded the testimony.

1. The Evidence Against Mr. Fry

Mr. Fry frequently sold methamphetamine to Cynthia Bell, and at the time of her death, she was in debt to him. J.A. 33-34, 50, 71, 169. There was testimony that Mr. Fry was upset about this debt and that he had threatened to kill Ms. Bell. J.A. 33, 127, 137. Witnesses described seeing a vehicle similar to Mr. Fry's near the crime scene shortly before the Bells' bodies were discovered. J.A. 28, 49. Certain witnesses, including Mr. Fry's brother, testified that they had seen Mr. Fry "spotted with blood" at a time close to when the murders occurred, and that Mr. Fry had admitted killing the Bells. J.A. 38, 71, 136, 140.[2] A criminalist called

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[2] However, Mr. Fry's brother, who testified under a grant of immunity, admitted that he had been threatened by police in connection with this case. J.A. 166; *see also* pages 2145, 2153-2154, and 2222 of the Reporter's Transcript of trial proceedings (hereinafter "Tr."), which has been lodged with the district court in Eastern District of Calif. Docket No. CV-01-01580-FCD-GGH-P. Additionally, Mr. Fry and his brother are not fond of one another. J.A. 166.

As to the other prosecution witnesses who testified that Mr. Fry had made incriminating statements, there was evidence that a) they had been threatened and coerced by law enforcement, or b) were otherwise unreliable. J.A. 143-146; Tr. 1715-1716, 1977-1978. For example, one of the witnesses was a notorious "jailhouse snitch." J.A. 41-43, 54-55. Law enforcement threatened another witness that she would be charged with

(Continued on following page)

by the prosecution testified that a gun owned by Mr. Fry was the murder weapon. J.A. 44.[3] Further, Mr. Fry fled from police when they attempted to arrest him. J.A. 71.

2. *The Admitted Evidence That the Murders Were Committed by Someone Other Than Mr. Fry*

A disinterested commercial truck driver from Missouri testified that he saw the shootings occur and that Mr. Fry was not the perpetrator. J.A. 56-57, 167-168.[4] An employee of the business at which the truck driver subsequently made a delivery testified that the driver looked like he had seen "a ghost" and that he was "very distraught." J.A. 67.[5]

Other witnesses testified that Anthony Hurtz, a known drug dealer, J.A. 168, had confessed to killing the Bells. J.A. 61-64, 179. However, the prosecution impeached

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murder along with Mr. Fry and that she would lose custody of her children if she did not testify against him. J.A. 146; Tr. 1977-1978.

[3] However, a defense ballistics expert, whom the prosecutor conceded to be credible, testified that Mr. Fry's gun could not be identified as the murder weapon. J.A. 49; Tr. 5109.

[4] At the time of the incident, Mr. Fry was 6'2", weighed 300 pounds, and was bald. *See* pages 427, 436-438, 519-520 of the Excerpts of Record in proceedings below in Ninth Cir. Case No. 04-16876. According to the truck driver, the shooter had a full head of hair and was "half the size" of Mr. Fry – approximately 5'6" to 5'8" and 140 pounds. J.A. 56.

[5] The prosecution attempted to undermine this evidence by questioning whether the homicides could have occurred at the time the truck driver claimed. J.A. 66-67. However, the prosecution adduced no evidence that this witness, who did not know Mr. Fry, or for that matter, anybody involved in the case, J.A. 56, 167-168; Tr. 4576, had any reason to testify falsely.

these witnesses with evidence of bias and prior inconsistent statements. For example, "[m]ost of these witnesses were either Hurtz's former girlfriends or family members of the former girlfriends." J.A. 179-180. One of the former girlfriends bluntly testified that she did not like Mr. Hurtz. J.A. 62; Tr. 4004. Another testified that her last contact with Mr. Hurtz ended with a "confrontation." Tr. 4160. The prosecution also adduced evidence that three of the witnesses had previously "lied" to police and/or had told police that they had not heard Mr. Hurtz confess. J.A. 63-64, 66; Tr. 4072, 4910. The California Court of Appeal characterized the testimony of these witnesses as "flimsy[,]" "ambiguous[,]" "self-contradictory[,]" and otherwise lacking in credibility. J.A. 73.[6]

In addition to these witnesses, Mr. Fry presented evidence that shortly before the Bells were killed, witnesses overheard the Bells talking on a pay phone and mentioning the name "Leroy." J.A. 28, 125; Tr. 1617-1618, 1621. Although James Bell's middle name was "Leroy," Mr. Hurtz goes by the nickname "Leroy." J.A. 28, 61, 125.[7]

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[6] Mr. Hurtz, who was called to testify by the defense, claimed he was not involved in the homicides and denied he had ever told anyone he was involved. J.A. 61; Tr. 2773-2774, 2777-2779.

[7] The defense also offered evidence that, after the homicides, another individual, who the defense contended was involved with Mr. Hurtz in the homicides, Tr. 525, 553-554, was in possession of Mr. Fry's gun, which, according to the prosecution, was the murder weapon. However, the trial court excluded this evidence. J.A. 98-101; Tr. 4762, 4772, 4847-4848. The California Court of Appeal held this ruling was erroneous, but that the error was not prejudicial. J.A. 98, 106-107.

3. *The Key Excluded Corroborating Evidence That the Murders Were Committed by Someone Other Than Mr. Fry*

As indicated above, the trial court refused to allow Mr. Fry to present to the jury the testimony of the only known unbiased witness who heard Mr. Hurtz confess to the murder of the Bells. J.A. 6-17, 167-180, 214. This witness was Mr. Hurtz's cousin, Pamela Maples. J.A. 7, 19. She did not know Mr. Fry. J.A. 7.[8]

Ms. Maples had "overhear[d] large portions of a conversation . . . in which Hurtz indicated that he had committed a double homicide." J.A. 212. "[T]he portions of the conversation Maples did hear involved idiosyncratic facts exactly matching the facts surrounding the murder of Cynthia and James Bell. . . . " J.A. 212. Thus, Ms. Maples' expected testimony strongly corroborated the evidence provided by the less reliable witnesses regarding Mr. Hurtz's incriminating statements. J.A. 179. Nevertheless, after a hearing in which Ms. Maples testified outside the presence of the jury, J.A. 6-17, the trial judge ruled that there was insufficient evidence to conclude that the double murder Ms. Maples heard Mr. Hurtz describing was the double murder with which Mr. Fry was charged. J.A. 14-17,

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[8] With respect to the evidence concerning Mr. Hurtz's confessions, the district court noted that "respondent does not dispute that Maples, as Hurtz'[s] cousin, was the only third party culpability witness who had no apparent bias." J.A. 178; *see also* Br. in Opp. to Petition at 7.

95.[9] Hence, the jury never heard this exculpatory evidence.[10]

C. Direct Review in State Court

Following his conviction, Mr. Fry appealed to the California Court of Appeal, First Appellate District. He presented a number of assignments of error, including a claim that the trial court had violated his constitutional rights by excluding Ms. Maples' proffered testimony regarding her cousin's confession to the double homicide.

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[9] This conclusion is refuted by the record, which reveals uncanny similarities between Ms. Maples' proffered testimony and the evidence adduced at trial concerning the circumstances of the victims' deaths: First, Ms. Maples heard Mr. Hurtz say he shot a female and a male who were in a car. J.A. 11, 15. The record reveals that Cynthia and James Bell died as a result of gunshot wounds inflicted while they were in a car. J.A. 26-27. Second, Ms. Maples heard Mr. Hurtz say he shot the female victim in the head, and that he then reached over and shot the male. J.A. 12. Evidence was adduced at trial that Ms. Bell, who was found in the driver's seat, died due to a gunshot wound to the head, and Mr. Bell was found shot to death in the passenger seat of a vehicle. The shooter was standing outside the driver's side of the vehicle when the shots were fired. J.A. 26-27; Tr. 1521. Third, Ms. Maples heard Mr. Hurtz describe the area of the shooting as a "parking place." J.A. 12. The bodies of the Bells were found in a "turnout" where motorists often park. J.A. 26; Tr. 845, 848-849. Fourth, Ms. Maples heard Mr. Hurtz say he was covered in blood after the shooting. J.A. 12. Trial testimony revealed that the shooter would have been covered in blood. Tr. 666-667, 1497, 1500, 1504. Fifth, Ms. Maples knew that Mr. Hurtz had resided in Fairfield, California. J.A. 15. The homicides occurred in Vacaville, California, Tr. 574, which, as noted in *Montgomery v. Superior Court of Solano County*, 46 Cal.App.3d 657, 661, 121 Cal.Rptr. 44, 47 (1975), is located ten miles away from Fairfield.

[10] Ms. Maples did not testify in either of Mr. Fry's first two trials. J.A. 181. Indeed, Mr. Fry's investigator did not locate and interview Ms. Maples until March 16, 1995, J.A. 18-24, at which time Mr. Fry's third trial was already underway.

J.A. 94. The state appellate court "found that the exclusion of Maples'[ ] testimony did not violate state law. . . . " Br. in Opp. to Petition at 2; J.A. 94-97.[11] In support of this conclusion, the court stated that there was no "other evidence supporting an inference that the killings allegedly described by Hurtz were those of Cynthia and James Bell. . . . " J.A. 97. Although the court acknowledged Mr. Fry's assignment of constitutional error concerning the exclusion of Ms. Maples' testimony, J.A. 94, it did not address the federal component of the claim. J.A. 94-97.

The court also stated in a footnote that "no possible prejudice" could have resulted from the exclusion of Ms. Maples' testimony because the jury heard evidence concerning other confessions made by Mr. Hurtz. J.A. 97. This conclusion, however, is directly at odds with the court's determination that the other testimony regarding Mr. Hurtz's confessions was "flimsy[,]" "ambiguous[,]" "self-contradictory[,]" and otherwise lacking in credibility. J.A. 73.

In any event, it is clear the state court did not consider prejudice under the *Chapman* standard. Indeed, "[t]he state opinion does not refer to the standard for harmless error established in *Chapman*. . . . " Br. in Opp. to Petition at 2; J.A. 94-97, 173-176. Furthermore, the state appellate court relied upon California case law,

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[11] The court based its state law determination on a finding that the trial court had appropriately exercised its discretion in excluding the evidence under California Evidence Code § 352, J.A. 97, which "is the rough equivalent of Federal Rule of Evidence 403. . . . " *Fowler v. Sacramento County Sheriff's Dep't.*, 421 F.3d 1027, 1033 n. 4 (CA9 2005); *People v. Hall*, 41 Cal.3d 826, 835, 718 P.2d 99, 226 Cal.Rptr. 112 (1986).

under which a prejudice inquiry much less demanding than *Chapman* is applied to assess the effect of the erroneous exclusion of third party culpability evidence. J.A. 95-97 (citing *People v. Hall*, 41 Cal.3d 826 (citing in turn *People v. Watson*, 46 Cal.2d 818, 299 P.2d 243 (1956), *cert. denied sub nom. Watson v. Teets*, 355 U.S. 846 (1957)); *see* 6 B. Witkin & N. Epstein, *California Criminal Law*, Reversible Error § 7 (3d ed. 2000).

The state appellate court affirmed Mr. Fry's conviction, and his petition to the California Supreme Court for discretionary review was summarily denied. J.A. 112-113.

D. § 2254 Proceedings in the District Court

Mr. Fry filed a habeas petition in the United States District Court, Eastern District of California, pursuant to 28 U.S.C. § 2254. The case was referred to a magistrate judge, who issued a 65-page memorandum of findings and recommendations. J.A. 114-207. At the outset of his memorandum, the magistrate judge stated that Mr. Fry had come "close to demonstrating actionable error in some of his various claims. . . . " J.A. 114. As to the merits of Mr. Fry's claim regarding the exclusion of Ms. Maples' testimony, the magistrate judge concluded that the ruling violated Mr. Fry's Sixth and Fourteenth Amendment rights. Furthermore, the magistrate judge determined that the state court decision rejecting Mr. Fry's claim was an unreasonable application of this Court's clearly established law. J.A. 180 (citing *Chambers v. Mississippi*, 410 U.S. 284; *Washington v. Texas*, 388 U.S. 14 (1967)). This conclusion was based on the magistrate judge's determination that the California Court of Appeal's statement that there was no "other evidence supporting an inference that

the killings allegedly described by Hurtz were those of Cynthia and James Bell[,]" J.A. 97, was "insupportable on the record of this case no matter how narrowly it is construed where seven other witnesses . . . specifically link Hurtz to the deaths of the Bells." J.A. 179. The magistrate judge also held Ms. Maples' proffered testimony was "reliable," and noted the State had conceded Ms. Maples "was the only third party culpability witness who had no apparent bias." J.A. 179-180.

In the final analysis, however, the magistrate judge concluded the constitutional error did not warrant a grant of federal habeas relief:

> While this court cannot conclude, as did the state appellate court[,] that 'no possible prejudice' could have ensued as a result of the exclusion of the testimony, the court does find that there has been an insufficient showing that the improper exclusion of the testimony of Ms. Maples had a substantial and injurious effect on the jury's verdict.

J.A. 181-182.

The district court adopted in full the findings and recommendations of the magistrate judge. J.A. 208-210.

E. Proceedings in the Court of Appeals

A divided panel of the Ninth Circuit affirmed. J.A. 211-214. The panel majority recognized that the state judge who presided over Mr. Fry's third jury trial had erroneously excluded "reliable" evidence that somebody else confessed to the murder Mr. Fry was convicted of committing. J.A. 212. Although the majority held the trial court's exclusion of the reliable third party culpability

evidence constituted an objectively unreasonable application of clearly established federal law, and that the evidence "would have substantially bolstered [Mr.] Fry's claim[] of innocence[,]" it concluded the error was harmless under *Brecht v. Abrahamson*, 507 U.S. at 637. J.A. 212 (internal quotation marks and brackets omitted). However, aside from quoting the "substantial and injurious effect" test of *Brecht*, the panel majority did not explain why it deemed the exclusion of "reliable" evidence of a third party's confession to be harmless. J.A. 212.

Adhering to circuit precedent, the panel majority rejected Mr. Fry's argument that *Chapman* rather than *Brecht* was the appropriate standard due to the state courts' failure to conduct *Chapman* harmless-error review. J.A. 212-213 (citing *Bains v. Cambra*, 204 F.3d 964, 976 (CA9), *cert. denied*, 531 U.S. 1037 (2000)). Additionally, although Mr. Fry contended the district court had improperly allocated to him the burden of persuasion on the question of prejudice, *see* pages 58-59 of Appellant's Opening Brief ("AOB"), Ninth Cir. Docket No. 04-16876, the Ninth Circuit majority failed to discuss the issue.

Judge Rawlinson dissented. She believed the "record as a whole militates in favor of a conclusion that exclusion of Ms. Maples' testimony substantially and injuriously affected the jury's verdict in this case." J.A. 214. Judge Rawlinson offered the following reasons for this conclusion: "[T]his was John Fry's third trial, with the two prior juries having failed to reach a verdict. In this third trial, even in the absence of [the excluded] exculpating testimony, the jury deliberated for five weeks before convicting [Mr.] Fry." J.A. 214. Pamela Maples, who would have testified that she heard her cousin confessing to the crime, "was the only unbiased witness presented by either side."

J.A. 214. "Such testimony is generally recognized as having a powerful impact on jurors." J.A. 214 (citing *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986)). Thus, Judge Rawlinson was "convinced that the exclusion of Ms. Maples' testimony was not harmless. . . ." J.A. 214.

Mr. Fry's petition for rehearing en banc was denied. J.A. 215. This Court granted certiorari. J.A. 216.

SUMMARY OF ARGUMENT

The constitutional error that occurred during Mr. Fry's third jury trial struck at the heart of the guilt/innocence determination the jury was called upon to make. The trial judge excluded evidence that someone other than Mr. Fry had confessed to the murder for which Mr. Fry is now imprisoned. If the state trial court had allowed Ms. Maples to testify regarding Mr. Hurtz's confession, and if the jury had credited her testimony, Mr. Fry would have been acquitted. Because it is undisputed that Ms. Maples was an unbiased witness who did not know Mr. Fry, it is a highly probable that the jury would have credited her testimony.

Although Mr. Fry pressed his claim of constitutional error in the state courts, they failed to recognize the constitutional violation and did not conduct the appropriate harmless-error analysis. In federal habeas proceedings, every judge who has considered the issue has found a constitutional violation and has characterized the state judiciary's treatment of the issue as objectively unreasonable given the reliability of the excluded third-party-guilt evidence. Yet, all but one of these federal judges have erroneously concluded, under the relatively deferential

harmless-error standard set forth in *Brecht*, that the error was not prejudicial.

The district court reached its conclusion that the error was not prejudicial under *Brecht* by requiring Mr. Fry to establish prejudice and finding that he had made an insufficient showing. The Ninth Circuit concluded that the error was not prejudicial under *Brecht*, without addressing Mr. Fry's assignment of error concerning the district court's misallocation of the burden of persuasion.

Brecht, however, is not applicable in Mr. Fry's case. Because the state courts did not even acknowledge that an error, much less a constitutional error, had occurred, they did not review the effect of the error under the *Chapman* standard. As a result, the justification offered in *Brecht* for using the substantial and injurious effect standard rather than *Chapman*'s more rigorous harmless-error standard does not apply. The holding in *Brecht*, that federal habeas courts are to employ a more deferential harmless-error standard, is premised on the notion that state reviewing courts can be relied upon to identify federal constitutional error and to assess the impact of such error under *Chapman*. However, in a case where that premise does not hold true, there is no reason for a federal habeas court to extend the deference mandated by *Brecht*, i.e., there is no reason to extend deference to a state court harmless-error review that never occurred.

The importance of *Chapman* review is particularly evident in a habeas case such as this one, in which constitutional error, ignored in state post-conviction proceedings, does not merely cast doubt on the fairness of the litigation or on the question of whether a constitutional value has been appropriately protected, but rather casts doubt on

the reliability of the guilt determination itself. Application of *Brecht* in such a case increases the possibility that the conviction of an innocent person will be left unremedied.

Regardless of which harmless-error standard is applied here, Mr. Fry's conviction cannot stand. This is so, because: 1) the constitutional error here consisted of the exclusion of reliable testimony that someone else committed the murders; 2) the evidence in the case was otherwise closely balanced on the question of who committed the double murder; 3) there were two prior, evenly-split hung juries; and 4) the deliberations in the third trial were contentious and extraordinarily lengthy, resulting in a verdict only after the third jury had once declared itself deadlocked 7-5. In light of these circumstances, even if the *Brecht* standard governs, the exclusion of Ms. Maples' testimony substantially influenced the jury's verdict.

ARGUMENT

I. WHERE RELIABLE EVIDENCE OF INNOCENCE HAS BEEN UNCONSTITUTIONALLY EXCLUDED FROM A CRIMINAL TRIAL, AND WHERE STATE REVIEWING COURTS HAVE FAILED TO ACKNOWLEDGE THE ERROR, A FEDERAL HABEAS COURT MUST ASSESS THE EFFECT OF THE ERROR UNDER *CHAPMAN V. CALIFORNIA*.

The selection of a harmless-error standard may be outcome-determinative in certain cases. *Chapman*, 386 U.S. at 22 (application of an insufficiently rigorous harmless-error standard "can work very unfair and mischievous results"); 5 W. LaFave, J. Israel, & N. King, *Criminal Procedure* § 27.6, p. 412 (2007 Supp.) ("Harmless error

principles, it has been said, may determine the outcome of more criminal appeals than any other doctrine.") (internal quotation marks omitted); *see also Brecht*, 507 U.S. at 644 (White, J., dissenting) ("the fate of one in state custody" pursuant to a conviction "tainted by a constitutional violation" could turn on harmless-error standard selected by reviewing court).

In *Chapman*, this Court established the harmless-error standard for constitutional violations. 386 U.S. at 24. Pursuant to *Chapman*, a constitutional error is not harmless unless the state, "the beneficiary" of the error, proves "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.*; *United States v. Dominguez Benitez*, 542 U.S. 74, 82 n. 7 (2004); *Fontaine v. California*, 390 U.S. 593, 596 (1968) (*per curiam*). This standard was chosen because, while it does not require "setting aside convictions for small errors or defects that have little, if any likelihood of having changed the result of the trial," *Chapman*, 386 U.S. at 22, it does ensure that constitutional violations "that affect substantial rights of a party" are not tolerated. *Id.* at 23 (internal quotation marks omitted). While the more forgiving *Kotteakos*[12] "substantial and injurious effect" standard applies on federal habeas review, *Brecht*, 507 U.S. at 638, that standard is appropriate only if the *Chapman* standard was correctly applied by the state courts. In Mr. Fry's case, where reliable evidence of third-party guilt was unconstitutionally excluded, and where no *Chapman* review was conducted in state court, J.A. 94-97, 113, *Brecht* is inapplicable.

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[12] *Kotteakos v. United States*, 328 U.S. 750 (1946).

A. Background – The Leading Harmless-Error Decisions

In this Court's harmless-error jurisprudence, standards for gauging whether errors warrant reversal of criminal convictions have been set forth in three seminal decisions: *Kotteakos v. United States*, *supra*; *Chapman v. California*, *supra*; and *Brecht v. Abrahamson*, *supra*.[13] The standards established in these cases are context-dependent, with variances attributable to the nature of the error at issue and the stage of post-conviction proceedings at which the error is being considered. J. Blume & S. Garvey, *Harmless Error in Federal Habeas Corpus After Brecht v. Abrahamson*, 35 Wm. & Mary L. Rev. 163, 163-164 (1993).

In *Kotteakos v. United States*, 328 U.S. 750, this Court established the harmless-error standard to be applied in criminal cases involving nonconstitutional error(s). *United States v. Lane*, 474 U.S. 438, 446 (1986); W. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L.J. 1, 14 n. 46 (1997). Acknowledging that such a standard "cannot ever be wholly imprisoned in words," 328 U.S. at 761, this Court nevertheless explicated the relevant considerations:

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. . . . But if one

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[13] *See also United States v. Dominguez Benitez*, 542 U.S. at 86 (Scalia, J., concurring) (noting additional decisions in which variant harmless-error standards have been adopted for particular issues).

> cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Id. at 764-765 (footnote omitted). The question is "what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting." *Id.* at 764. Applying this standard, "it is not the appellate court's function to determine guilt or innocence." *Id.* at 763.

In *Chapman*, the petitioners were convicted in a state jury trial in which *Griffin* error occurred. 386 U.S. at 18-20.[14] On direct review, this Court rejected the petitioners' argument that such error is reversible *per se*, and instead held "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." *Id.* at 21-22. However, "[i]n fashioning a harmless-constitutional-error rule," this Court was mindful "that harmless error rules can work

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[14] *Griffin* error occurs when a jury is invited, usually by a prosecutor, to draw an adverse inference from a defendant's exercise of his/her Fifth Amendment right not to testify at trial. *Griffin v. California*, 380 U.S. 609 (1965).

very unfair and mischievous results. . . . " *Id.* at 22. Thus, this Court held "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24. "[C]onstitutional errors that affect substantial rights of a party" cannot satisfy this standard. *Id.* at 23 (internal quotation marks omitted) (citing *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)). The reviewing court must look to "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24. Applying this standard in *Chapman*, this Court concluded the error in that case could not be treated as harmless because, although there was a "reasonably strong" case against the petitioners, the prosecution made repeated improper references to the petitioners' failure to testify, accompanied by an overarching suggestion that the jury could infer guilt from the petitioners' silence. *Id.* at 25. Absent this constitutional error, this Court could not say that "honest, fair-minded jurors might very well have brought in not-guilty verdicts." *Id.* at 25-26.

The *Chapman* standard is "[c]onsistent with the jury-trial guarantee." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). Indeed, the question a reviewing court is to consider under *Chapman* "is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand." *Id.* (citing *Chapman*, 386 U.S. at 24). "The inquiry, in other words, is . . . whether the guilty verdict rendered in *this* trial was surely unattributable to

the error." *Id.* (italics in the original).[15] "That must be so, because to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee." *Id.*

After more than twenty-five years of applying the *Chapman* standard to constitutional error in criminal cases, this Court held in *Brecht* that "[t]he *Kotteakos* harmless-error standard is better tailored to the nature and purpose of collateral review than the *Chapman* standard, and application of a less onerous harmless-error standard on habeas promotes the considerations underlying our habeas jurisprudence." 507 U.S. at 623. However, this holding cannot be divorced from its context.

The petitioner in *Brecht* had been convicted of first-degree murder in a jury trial in Wisconsin. *Id.* at 624-625. On appeal, the Wisconsin Court of Appeals concluded that a *Doyle* violation[16] in the petitioner's trial was "sufficiently 'prejudicial' to require reversal." *Id.* at 626. However, the Wisconsin Supreme Court reinstated the conviction, concluding that the constitutional error was harmless beyond a reasonable doubt under *Chapman*. *Id.*

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[15] "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything the jury considered on the issue in question. . . . " *Yates v. Evatt*, 500 U.S. 391, 403 (1991), *disapproved on other grounds in Estelle v. McGuire*, 502 U.S. 62, 72 n. 4 (1991).

[16] *Doyle v. Ohio*, 426 U.S. 610 (1976) (holding that due process forbids comment on a defendant's silence after the police have admonished the defendant pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966)).

The petitioner then sought federal habeas relief. The district court granted the writ, determining that the State's case against the petitioner had not been "overwhelming," and thus the state supreme court's holding that the *Doyle* violation was harmless was erroneous. 507 U.S. at 626. The Seventh Circuit reversed, holding that a) the effect of a *Doyle* error was most appropriately assessed under the *Kotteakos* standard, and b) there was no basis for a finding of prejudice using that standard. *Id.* at 626-627.

This Court granted certiorari to resolve a conflict between the courts of appeals "on the question whether the *Chapman* harmless-error standard applies on collateral review of *Doyle* violations." *Brecht*, 507 U.S. at 627; *see also id.* at 647 (White, J., dissenting) (noting that the parties' arguments had focused on the harmless-error standard applicable to *Doyle* error and violations of other "so-called 'prophylactic' rules"). Adverting to the pre-AEDPA version of § 2254 which was in effect at the time, this Court observed that the statute was "silent" regarding the applicable standard of harmless-error inquiry. *Id.* at 631. Accordingly, this Court found it necessary to determine the appropriate standard by reference "to the considerations underlying [this Court's] habeas jurisprudence. . . . " *Id.* at 633.

First, the majority observed "that collateral review is different from direct review[,]" *id.*, and that "the writ of habeas corpus has historically been regarded as an extraordinary remedy[.]" *Id.* This Court also acknowledged the State's "interest in the finality of convictions that have survived direct review within the state court system." *Id.* at 635. Further, this Court stated that " 'liberal allowance of the writ . . . degrades the prominence of the trial itself,' "

id. (quoting *Engle v. Isaac*, 456 U.S. 107, 127 (1982)), and that "[r]etrying defendants whose convictions are set aside also imposes significant 'societal costs,'" including financial burdens and the difficulties inherent in conducting a retrial after significant delay. *Brecht*, 507 U.S. at 637 (quoting *United States v. Mechanik*, 475 U.S. 66, 72 (1986)).

After stating these concerns, the *Brecht* majority explained that "[s]tate courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman*, and state courts often occupy a superior vantage point from which to evaluate the effect of trial error." 507 U.S. at 636 (citing *Rushen v. Spain*, 464 U.S. 114, 120 (1983) (*per curiam*)). On this basis, this Court concluded that "it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that *Chapman* requires state courts to engage in on direct review." *Id.*[17] Accordingly, this Court held that "the *Kotteakos* harmless-error standard applies in determining whether habeas relief must be granted because of constitutional error of the trial type." *Id.*

Concurring, and supplying the decisive vote in *Brecht*, Justice Stevens emphasized that the *Kotteakos* standard is quite exacting and that the government bears the burden of persuasion under that standard. *Id.* at 641. Moreover, Justice Stevens explained that the manner in which the standard is phrased "is far less important than the quality of the judgment with which it is applied." *Id.* at 643.

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[17] *See California v. Roy*, 519 U.S. 2, 5 (1996) (*per curiam*) (applying the *Brecht-Kotteakos* standard on collateral review, and in doing so, stressing that the state courts had performed *Chapman* harmless-error analysis).

B. The Rationale Underlying This Court's Decision to Apply the *Kotteakos* Standard in *Brecht* Is Inapplicable Where No Court Has Previously Applied the *Chapman* Standard in Evaluating Whether Constitutional Error Is Harmless.

As discussed above, *Chapman* requires a new trial where the State cannot prove beyond a reasonable doubt that a guilty verdict was "surely unattributable" to constitutional error. *Sullivan v. Louisiana*, 508 U.S. at 279. This rigorous standard is necessary "to protect people from infractions by the States of federally guaranteed rights[,]" *Chapman*, 386 U.S. at 21, particularly in cases where "the question of guilt or innocence is a close one." *Id.* at 22. Thus, the *Chapman* standard is critical to "the reliability of the criminal process." *Brecht*, 507 U.S. at 650 (O'Connor, J., dissenting).

A criminal defendant should not be deprived of the right to have the prejudicial effect of a constitutional error assessed under the *Chapman* standard solely because a state appellate court failed to identify the constitutional defect in trial proceedings. The complete denial of exacting harmless-error review, however, is the consequence of a rule under which the *Brecht* standard is applied in federal habeas, even if, in antecedent state appellate proceedings, the state courts failed to identify the constitutional error, and thus failed to conduct *Chapman* harmless-error analysis.

Far from laying the consequences of such state-court error at the habeas petitioner's feet, this Court's holding in *Brecht* was actually quite limited. *See Orndorff v. Lockhart*, 998 F.2d 1426, 1430 (CA8 1992), *cert. denied sub nom. Norris v. Orndorff*, 511 U.S. 1060 (1994). The state

appellate courts in *Brecht* had reviewed the constitutional error in question under *Chapman*. *Brecht*, 507 U.S. at 626-627. That being the case, this Court stated that "state courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman*," and that "it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that *Chapman* requires state courts to engage in on direct review." *Brecht*, 507 U.S. at 636. Clearly then, *Brecht* is premised on the notion that when (and if) the state courts apply the *Chapman* harmless-error standard, the federal habeas courts need only review the same error under the *Kotteakos* harmless-error standard. *Id.*; *Orndorff*, 998 F.2d at 1430. It follows that where an otherwise "fully qualified" state court fails in its obligation to "identify constitutional error," and therefore deprives itself of any occasion to "evaluate [the] prejudicial effect [of the error] . . . under *Chapman*," *id.*, the "logic[]" recognized in *Brecht* dictates that the federal habeas court "engage in . . . the harmless-error review that *Chapman* requires state courts to engage in on direct appeal."

That a federal habeas court should apply *Chapman* rather than *Brecht* where the state court failed to recognize a constitutional error is compelled not only by the premise of *Brecht* itself, it is also preferable as a matter of policy and workability. To begin with, the comity concerns arising out of a federal court's repetition of "the identical approach" undertaken by a state court simply do not exist where the state court should have applied, but failed to apply, *Chapman*. Furthermore, insistence upon the application of *Brecht* regardless of any omissions by the state court would serve only to compound the state court's error,

further undermining the values recognized in *Chapman*. *See Barber v. Johnson*, 145 F.3d 234, 237-238 (CA5) (Dennis, J., concurring) (quoting *Chapman*, 386 U.S. at 21), *cert. denied*, 525 U.S. 1005 (1998) (where a federal court "repeat[s] [a] state court's error" by failing to review a constitutional error under the *Chapman* standard, the federal court "will have failed in its obligation to 'protect people from infractions by the States of federally guaranteed rights'").[18] Indeed, as one court cogently observed,

> *Brecht*'s rule cannot be that a federal court must blindly apply *Kotteakos*, rather than *Chapman*, as soon as it receives a § 2254 petition, utterly without regard to the . . . [state court's treatment of the issue.] If that were *Brecht*'s rule, a federal court would have to apply *Kotteakos* simply because it was technically conducting collateral review of a criminal conviction, even if a state were to eliminate all direct appeals of criminal convictions – as it is likely that it constitutionally could do . . .

Lyons v. Johnson, 912 F. Supp. 679, 689 n. 9 (S.D.N.Y. 1996); *see also id.* at 689 ("federal courts should, under *Brecht*, respectfully defer to state courts' analyses of the harmlessness of constitutional error – but where no prior state court *Chapman* holding exists, there is nothing to which to defer"); 2 R. Hertz & J. Liebman, *Federal Habeas*

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[18] *See Reed v. Ross*, 468 U.S. 1, 10 (1984) ("There can be no doubt that in enacting § 2254, Congress sought to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action.") (internal quotation marks omitted).

Corpus Practice and Procedure § 31.1, p. 1507, n. 19 (5th ed. 2005).[19]

The irrationality of applying *Brecht* in federal habeas in the absence of an antecedent state court finding of harmlessness under *Chapman* is further underscored when the requirements of § 2254(d) are added to the mix. For example, if, after recognizing the existence of a constitutional error, a state court were to apply its own brand of harmless-error analysis, and if that analysis bore a closer resemblance to *Brecht* than to *Chapman*, a federal habeas court would have no difficulty concluding that the state court's decision was "contrary to" *Chapman* under § 2254(d)(1). At that point, the very deviation from the holding of *Chapman* that satisfied § 2254(d)(1)'s "contrary to" clause would logically compel the federal court to act correctly where the state court acted incorrectly – that is, to give the prisoner the benefit of a harmlessness review under the *Chapman* standard. *See* A. Hirsch, *Harmless-Error Analysis in Habeas Corpus Cases: Should Brecht Still Apply?* 25 Champion 28, 30 (2001). To instead permit (or require) the federal court to apply the same standard it rightly faulted the state court for applying would render both the § 2254(d)(1) inquiry and the mandate of *Chapman* meaningless technicalities.

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[19] As the Sixth Circuit recently explained in a related context: "[W]e owe a different type of deference to state proceedings when a state court has found an error to be harmless than when it found no error. . . . [¶] . . . When a state court explicitly has held that an error was harmless, we owe deference to that conclusion of law as a matter of comity. When a state court does not reach the question of harmless error, we owe no such deference, since there is no relevant conclusion of law to which we could defer." *Eddleman v. McKee*, ___ F.3d ___, 2006 U.S. App. LEXIS 30629, *21-22 (CA6 2006).

C. Rigorous Harmless-Error Review Is Necessary to Protect Defendants from Erroneous Convictions.

"Getting harmless-error determinations right . . . is central to accurate determinations of guilt. . . . " J. Solomon, *Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error In Criminal Trials*, 99 Nw. U.L. Rev. 1053, 1055 (2005).

This Court has repeatedly stressed the intuitive notion that when the likelihood of an erroneous conviction of an innocent person has been established, a meaningful opportunity to correct the error must be made available. In such cases, the concerns identified in *Brecht*, which typically justify limitations on the available scope of post-conviction relief, must yield. *House v. Bell*, 126 S.Ct. 2064, 2076 (2006) ("'the principles of comity and finality . . . "must yield to the imperative of correcting a fundamentally unjust incarceration[.]"'") (quoting *Murray v. Carrier*, 477 U.S. 478, 495 (1986) (quoting in turn *Engle v. Isaac*, 456 U.S. at 135); *accord*, *Withrow v. Williams*, 507 U.S. 680, 718 (1993) (Scalia, J., dissenting) (referring to the "possibility that the assigned error produced the conviction of an innocent person" as the "most significant" factor weighing in favor of a federal court's exercise of discretion to entertain a habeas claim); *Teague v. Lane*, 489 U.S. 288, 313 (1989) (plurality opinion) ("our cases have moved in the direction of reaffirming the relevance of the likely accuracy of convictions in determining the available scope of habeas review"); *Kuhlmann v. Wilson*, 477 U.S. 436, 452 (1986) (plurality opinion) ("[A] prisoner retains a powerful and legitimate interest in obtaining his

release from custody if he is innocent of the charge for which he was incarcerated.").[20]

The unconstitutional exclusion of Ms. Maples' reliable and unbiased testimony regarding her cousin's confession may well have led to the conviction of an innocent man. To guard against this ultimate miscarriage of justice, this grave constitutional error must be reviewed by some court, at some stage, under the exacting *Chapman* standard. Only if it can be determined beyond a reasonable doubt that the error did not have any bearing on the jury's decision to convict can the error be treated as harmless. *Chapman*, 386 U.S. at 24. Thus, application of the *Chapman* harmless-error standard in a case such as this comports with the "fundamental value determination of our society" to prevent condemnation of the innocent. *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

II. THE ERROR WAS PREJUDICIAL UNDER THE *BRECHT-KOTTEAKOS* STANDARD.

Even if *Brecht* is the appropriate harmless-error standard, the exclusion of Ms. Maples' reliable testimony had a substantial and injurious effect on the jury's verdict. As noted previously, the first two trials ended when the respective juries could not reach a verdict. J.A. 121. This was not a fluke, as there was substantial probative evidence of

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[20] *See also* R. Berkowitz, *Error-Centricity, Habeas Corpus and The Rule of Law as The Law of Rulings*, 64 La. L. Rev. 477, 498-502 (2004); J. Steiker, *Innocence and Federal Habeas*, 41 U.C.L.A. L. Rev. 303, 363 (1993); J. Jeffries & W. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. Chi. L. Rev. 679 (1990); H. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970).

Mr. Fry's innocence. The jury in the third trial deliberated for five weeks and only reached a verdict after a) having at one point declared itself deadlocked 7-5,[21] b) asking for clarification concerning the reasonable doubt standard, c) requesting numerous read-backs of testimony, and d) changing forepersons. J.A. 121, 167.

The sheer closeness of the case, underscored by the prior hung juries and the lengthy and difficult deliberations, militates against a finding of harmlessness regardless of the prejudice standard. *See, e.g., Kennedy v. Lockyer*, 379 F.3d 1041, 1056 n. 18 (CA9 2004) (prior hung jury and lengthy deliberations), *cert. denied*, 544 U.S. 992 (2005); *United States v. Velarde-Gomez*, 269 F.3d 1023, 1036 (CA9 2001) (lengthy deliberations); *United States v. Varoudakis*, 233 F.3d 113, 126 (CA1 2000) (lengthy deliberations and indication of impasse during deliberations).[22]

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[21] The jurors did not indicate whether they were split 7-5 in favor of conviction or acquittal. However, they did indicate they had taken numerous ballots before declaring themselves deadlocked. By that point, only two of the jurors were of the opinion they were not hopelessly deadlocked. J.A. 121.

[22] *See also United States v. Beckman*, 222 F.3d 512, 526 (CA8 2000) (prior hung jury); *United States v. Santana*, 175 F.3d 57, 67 (CA1 1999) (prior hung jury); *United States v. Paguio*, 114 F.3d 928, 935 (CA9 1997) (prior hung jury); *United States v. Ottersburg*, 76 F.3d 137, 140 (CA7 1996) (lengthy deliberations); *United States v. Doe*, 903 F.2d 16, 28 (CADC 1990) (prior hung jury); *United States v. Schuler*, 813 F.2d 978, 982 (CA9 1987) (prior hung jury); *Dallago v. United States*, 427 F.2d 546, 559 (CADC 1969) (lengthy deliberations).

In *Kennedy v. Lockyer*, 379 F.3d 1041, the court stated: "From the fact that the first trial ended in a mistrial [8-4 in favor of conviction], as well as the fact that the jury deliberated for a considerable amount of time in the second trial [3 days of deliberation after 1 day of evidence], we infer that the question as to . . . guilt or innocence was a close one in both trials." *Id.* at 1056 n. 18. In *United States v. Varoudakis*, 233 F.3d 113, the court stated: "[T]he three-day length of the jury deliberations,

(Continued on following page)

These same facts are particularly pertinent in assessing prejudice under *Brecht* given this Court's admonition in *Kotteakos* that "[t]he crucial thing is the impact of the thing done wrong on the minds of other[s] . . . , not on one's own in the total setting." 328 U.S. at 764. In other words, "one must judge others' reactions not by his own, but with allowance for how others might react. . . . " *Id.* Thus, the prejudice inquiry in this case must involve an assessment of the impact Ms. Maples' testimony would have had on the third jury – a jury that unquestionably had extraordinary difficulty in reaching its verdict. Because the record unequivocally establishes that the third jury struggled for weeks with the evidence presented, the court of appeals erred in concluding that Ms. Maples' unbiased, reliable testimony would not have influenced the jury's verdict.

Additionally, notwithstanding the exclusion of Ms. Maples' testimony, the jury heard evidence that someone other than Mr. Fry committed the double murder in question. The truck driver who witnessed the killings, and who did not know anyone involved in the case, testified that Mr. Fry was not the killer. J.A. 167-168. Seven other witnesses testified that Anthony Hurtz had made confessions and other incriminating statements "specifically link[ing]" him to the killings. J.A. 179.[23] Although the prosecution also presented evidence implicating Mr. Fry,

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and the jury's note to the trial court that it was 'at an impasse' at the end of the second half-day, weigh against a finding of harmless error." *Id.* at 126. The circumstances deemed to preclude findings of harmlessness in these cases pale in comparison to the relevant circumstances of the instant case.

[23] "The sheer number of independent confessions provide[s] additional corroboration for each." *Chambers v. Mississippi*, 410 U.S. at 300-301.

the defense not only countered much of that evidence, but presented a plausible alternative theory. Thus, this case differs markedly from *Brecht*, where "the State's evidence of guilt was, if not overwhelming, certainly weighty." 507 U.S. at 639.

Furthermore, the nature of the constitutional error in this case, a violation of Mr. Fry's Sixth and Fourteenth Amendment rights to present evidence relevant to his guilt or innocence, must be taken into account. *Kotteakos v. United States*, 328 U.S. at 765-766 (noting that "the nature of the error" in question "and 'its natural effect' for or against prejudice in the particular setting[]" bear on the ultimate inquiry). The exclusion of Ms. Maples' unbiased testimony inhibited the jury's ability to "decide where the truth lies." *Washington v. Texas*, 388 U.S. at 19; *accord*, *Holmes v. South Carolina*, 126 S.Ct. 1727, 1735 (2006) ("the petitioner proffered evidence that, if believed, squarely proved that [someone else], not petitioner, was the perpetrator."); *Crane v. Kentucky*, 476 U.S. 683, 690-691 (1986) (the exclusion of "competent, reliable evidence" that is "central to the defendant's claim of innocence . . . deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing") (citations and internal quotation marks omitted); *Chambers v. Mississippi*, 410 U.S. at 300-303 (exclusion of reliable evidence regarding alternate suspect's confessions renders a trial fundamentally unfair).

As Judge Rawlinson noted in her dissenting opinion, Ms. Maples "was the only unbiased witness" in this case who heard Mr. Hurtz confess to committing the crime for which Mr. Fry is now imprisoned. J.A. 214. Thus, the testimony Ms. Maples would have provided is the type of

testimony "generally recognized as having a powerful impact on jurors." J.A. 214 (citing *Skipper v. South Carolina*, 476 U.S. at 8).

By contrast, the Ninth Circuit panel majority concluded that although Ms. Maples' testimony "would have substantially bolstered Fry's claims of innocence[,]" J.A. 212 (internal quotation marks and brackets omitted), the unconstitutional exclusion of the evidence was harmless because "it did not have 'a substantial and injurious effect or influence in determining the jury's verdict.'" J.A. 212. This conclusion is paradoxical: To state that the exclusion of evidence would have "substantially bolstered" a claim of innocence is at odds with an assertion that the exclusion of the evidence "did not have a substantial and injurious effect" on the jury's verdict. Such an insoluble explanation does not reflect the importance of the "quality of . . . judgment" in conducting harmless-error review to which Justice Stevens referred in his concurrence in *Brecht*. 507 U.S. at 643 ("the way we phrase the governing standard is far less important than the quality of the judgment with which it is applied").

Perhaps the panel majority's inexplicable determination that the error was harmless stemmed from an implicit misallocation of the risk of non-persuasion under *Brecht*. The district court had improperly allocated the burden of persuasion (or risk of non-persuasion) to Mr. Fry,[24] and

[24] The district court characterized this as a "difficult case" and stated that Mr. Fry had "come[ ] close to demonstrating actionable error[,]" J.A. 114, 205, but that ultimately "there ha[d] been an insufficient showing that the improper exclusion of [the] testimony of Ms. Maples had a substantial and injurious effect on the jury's verdict." J.A. 181-182. This language reveals the district court was looking to Mr. Fry to "demonstrat[e]" or "show[ ]" prejudice. The court was not looking to

(Continued on following page)

although Mr. Fry raised this burden-shifting issue in the Ninth Circuit, AOB at 58-59, the panel majority did not address the issue. The district court's allocation of the burden of persuasion to Mr. Fry contravened this Court's holding in *O'Neal v. McAninch*, 513 U.S. 432.[25] The Ninth Circuit panel majority's finding of harmlessness can be viewed as slightly less inexplicable if it too was based upon a misallocation of the burden of persuasion.

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the State to make such a showing, and the court did not saddle the State with "the risk of non-persuasion." *O'Neal v. McAninch*, 513 U.S. at 447 (Thomas, J., dissenting).

[25] In *O'Neal* this Court directly addressed the issue of the proper allocation of the burden of persuasion with respect to prejudice in habeas cases. Noting that traditional burdens of proof are inapposite in the context of harmless-error review, where a judge is called upon to apply "a legal standard (harmlessness) to a record" that has already been developed, 513 U.S. at 436, this Court recast the burden issue as, instead, a question as to which party prevails when "the matter is so evenly balanced that [the judge] feels himself in virtual equipoise as to the harmlessness of the error." *Id.* at 435. Although this Court observed that cases involving such a state of equipoise, i.e., "'grave doubt,'" are "unusual[,]" *id.*, *see also id.* at 452 (Thomas, J., dissenting) (such a state of equipoise is present in "only a minuscule fraction of cases"), this Court held that the petitioner prevails in these cases. *Id.* at 435. Effectively, then, the State bears the risk of non-persuasion.

More recently, in *United States v. Dominguez Benitez*, 542 U.S. 74, this Court stated that when a constitutional error comes up on collateral review, "the Government has the burden of showing that [the] . . . error is harmless. . . ." *Id.* at 81 n. 7; *accord*, *Darden v. Wainwright*, 477 U.S. 168, 197 (1986) (Blackmun, J., dissenting) (noting that under "[e]very harmless error standard . . . this Court has employed . . . , once serious error has been identified, the burden shifts to the beneficiary of the error to show that the conviction was not tainted"); *Lainfiesta v. Artuz*, 253 F.3d 151, 158 (CA2 2001) (noting that in harmless-error review under *Brecht* "[t]he burden of persuasion is on the government"), *cert. denied sub nom. Lainfiesta v. Greiner*, 535 U.S. 1019 (2002); 3B C. Wright, N. King & S. Klein, *Federal Practice and Procedure: Criminal 3d*, § 854, p. 465 (2004) ("harmless error requires the prosecutor to disprove prejudice").

In any event, regardless of the harmless-error standard that governs in this case, and regardless of the allocation of the risk of non-persuasion under that standard, there is no basis in law or fact for characterizing the error in this case as harmless, as it struck directly at the guilt/innocence determination in this case: If Ms. Maples' proffered testimony is true, Mr. Fry is innocent of the murder for which he has now been imprisoned for nearly 15 years, and the actual killer has gotten away with murder. Even under *Brecht*, such error cannot be deemed to have had an insubstantial effect on the jury's verdict.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

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APPENDIX A

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel

under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.